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No. 89-1578

In The

Supreme Court of the United States

October Term, 1989

GARY MOORE,

Petitioner,

v.

CITY OF COSTA MESA, a municipal corporation, and THE CITY COUNCIL OF THE CITY OF COSTA MESA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

MADORY, BOOTH, ZELL AND PLEISS
A Professional Corporation
LARRY T. PLEISS
17822 East 17th Street
Suite 205
Tustin, California 92680-2183
(714) 832-3772

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Although Petitioner sets forth a trilogy of questions, in reality only one is presented by the Petition. That pertains to whether the Court of Appeals, in affirming the District Court's holding that no compensable taking within the ambit of the Fifth and Fourteenth Amendments occurred, has decided an important federal question which has not been, but should be settled by the court.

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INTRODUCTION

Respondents, CITY OF COSTA MESA, a municipal corporation, and the CITY COUNCIL OF THE CITY OF COSTA MESA, hereby submit their Brief in opposition to the Petition for a Writ of Certiorari to review judgment of the Court of Appeals for the Ninth Circuit in this case. By this Petition, the court is invited to scrutinize and then overturn the reasoned exercise of discretion by the Ninth Circuit Court of Appeals and the underlying District Court in dismissing petitioner's Complaint for failure to state a claim against respondents, upon which relief can be granted within the ambit of *Federal Rules of Civil Procedure*, Rule 12(b)(6). A considered review of the record below, and the applicable statutory and decisional authority plainly demonstrates the wisdom and propriety of the lower courts opinions. In addition thereto, as is more fully set forth hereinbelow, several compelling reasons exist for the court not to exercise its discretion and, therefore, deny the Petition herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 886 F.2d 260 (9th Cir. 1989), and is reproduced as Appendix (App.) A. The opinion of the United States District Court for the Central District of California is reported at 678 F.Supp. 1448 (C.D. Cal. 1987), and is reproduced as App. B. The unpublished opinion of the California Court of Appeals for the Fourth Appellate District, Division 3, in the preceding State Court action is reproduced as App. C. The judgment of

the Orange County Superior Court in the preceding State Court action is reproduced as App. D.

JURISDICTION

Respondents do not question the jurisdiction of this court under 28 U.S.C. § 1254(1) as set forth in the Petition.

CONSTITUTIONAL PROVISIONS, STATUTES AND CODES INVOLVED

The text of the following constitutional provisions, statutes, and codes relevant to the determination of the Petition are set forth as App. E and are: *U.S. Const. Amend.* I; *U.S. Const. Amend.* V; *U.S. Const. Amend.* XIV; Civil Rights Act of 1871, 42 U.S.C. § 1983; and *Costa Mesa Muni. Code*, § 13-316.

STATEMENT OF THE CASE

A. Factual Background

Petitioner owns two adjoinir g lots, containing 12,862 square feet with a 107 foot frontage on Wilson Street, Costa Mesa, California [App. C-1]. The aforesaid street is 40 feet wide, curb to curb, with a 60 foot right-of-way [*Id.*]; [App. C-2]. The City's Master Plan of Highways shows that Wilson Street will eventually be widened to a 70 foot street and an 84 foot right-of-way [*Id*].

While the streets where the Master Plan requires additional property for street widening, the City's Municipal Code[1] requires a land dedication for street widening as a condition to granting a Building Permit over $2,000.00. In applying the Code, the City's Planning District analyzes the proposed development to determine the vehicle traffic it will generate. If the proposed development increases traffic flow, the dedication requirement is imposed. If not, the requirement is waived or the developer may seek a variance [App. C-2].

Petitioner's lots are zoned C-1, Local Business. Commercial properties abut Wilson Street on both sides. A medium density condominium complex is behind the lots. At present and at all times pertinent, two older houses are on the lots; petitioner used to live in one and use the other as an office and storage facility for his carpet installation business, under a Conditional Use Permit [*Id.*].[2]

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[1] Costa Mesa Municipal Code, Section 13-316 [See App. E-1].

[2] In late 1983, petitioner requested zoning variances for a permit to build a 6,621 square foot building on the two lots, a 3,528 square foot warehouse with 3,028 of office space on a second floor [App. C-2]. He also requested a new Conditional Use Permit to allow his business to occupy the proposed buildings [*Id.*]. In analyzing petitioner's variance request, the Planning District used the City's General Plan Traffic Study to determine the anticipated traffic load which a typical 6,621 square foot C-1 building would generate. The staff estimated that petitioner's building would generate 230 "trip ends" (vehicle arrivals or departures), 191 more trip ends than the estimate for the current structures. The staff recommended denying petitioner's requested variance from the dedication requirement since petitioner's development would create an estimated 600% increase in traffic at the site [App. C-3].

After holding public hearings in January, 1984, the City's Building Commission granted petitioner's Building Permit and Conditional Use Permit, but denied the variance from the dedication provision which required petitioner to dedicate the 12 foot Wilson Street frontage to complete the 84 foot right-of-way [App. C-2]. The dedication area, 1,308 square feet is 10.17% of the lots total area.[3]

In March, 1984, petitioner filed an action in Superior Court of the State of California in and for the County of

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[3] Petitioner appealed the Commission's decision to the City [App. C-3]. A public hearing was held in February, 1984 by the City Council and granted the permits subject to the same conditions [*Id.*]. In essence, petitioner was compelled by the exaction to give up the usage of a couple of parking spaces so as to allow for the placement and construction of public sidewalk. In California, as in other states, local governments rely extensively upon dedications and exactions as a means of placing some of the costs of new or intensified development on permittees and developers. For about forty-seven years this has been so. At first, California law permitted mandatory dedications and exactions only for streets, alleys, drainage, and public utility easements necessitated by development [See *Cal. Gov't Code*, § 66475, first enacted in 1943, as *Cal. Bus. & Prof. Code*, § 11535]. In later years, laws in California were enacted granting authority to condition subdivision approval upon either dedication of land or provision of in-lieu fees for other infrastructure elements required for new subdivisions. Local governments, like respondents, were given authority, inter alia, to require payment of fees to defray the cost of drainage and sanitary sewer facilities [*Cal. Gov't Code*, § 66483] and to defray the cost of constructing bridges and "major thoroughfares", *Cal. Gov't Code*, § 66484. The reason why such laws are favored is because of the manifest public benefit which inures from their application.

Orange requesting (1) mandamus to set aside the condition, (2) declaratory relief that the condition was invalid, (3) damages for inverse condemnation, and (4) general damages and attorneys' fees [App. F-3, C-3]. The state Superior Court, which reviews zoning decisions on a "substantial evidence" standard, granted petitioner's mandamus and declaratory relief action [App. F-4, C-3]. It was held that respondent's proposed condition was not reasonably related to the relatively small projected increase in traffic from the new building [*Id.*]. Respondent pursued an appeal in the California Court of Appeals for the Fourth District, Division 3, and in an unpublished decision, the Court of Appeals affirmed the Superior Court Ruling on a 2-1 vote, with the dissenting Justice voting to uphold the respondent's condition [App. F-4; C-1/8]. The California Supreme Court denied review, with Justice Reynoso dissenting [App. B-3, F-4].

B. Proceedings Below

On February 20, 1987, petitioner filed suit in United States District Court for the Central District of California. Subsequently on May 20, 1987, respondent moved to dismiss petitioner's entire action under *Federal Rules of Civil Procedure*, Rule 12(b)(6) [App. B-3]. Petitioner's opposition was filed on June 8, 1987 with a supplemental response also filed on June 14, 1987. Respondent's reply was filed on June 17, 1987. The Motion to Dismiss was heard by the District Court on June 22, 1987 [*Id.*]. The District Court entered judgment dismissing petitioner's Complaint with prejudice on July 6, 1987, on the grounds

that it was barred by res judicata[4] and that it failed to state a claim upon which relief could be granted. Petitioner timely filed a Motion for a new trial on July 16, 1987 [App. B-4]. *Fed. R. Civ. Proc.*, R. 59. Opposition to the Motion for a new trial was filed by respondent on July 22, 1987. Oral argument was heard on August 10, 1987 and the District Court entered its Amended Memorandum of Decision on August 22, 1987 [App. B-11]. Petitioner filed a timely appeal of the District Court's decision on September 25, 1987.

Petitioner filed his Opening Brief on March 7, 1988. Respondents filed their Responsive Brief on April 1, 1988. Petitioner responded with a Reply Brief which was filed on May 9, 1988. Oral argument was then heard on August 3, 1988.

On September 26, 1989, the Ninth Circuit Court of Appeals published its Opinion affirming the District Court's ruling that no compensable taking occurred under the circumstances involved.[5] Petitioner then

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[4] Respondents have conceded that res judicata does not apply to the facts of this case [App. A-4 n.2].

[5] Petitioner's pleadings alleged manifold theories of relief including abridgement of First Amendment rights and privileges but the *only* theory pursued in the lower courts is under the Fifth and Fourteenth Amendments. More specifically, the gravamen of petitioner's claims arise under the "taking" clause of the Fifth Amendment wherein it declares that property shall not "be taken for public use without just compensation." The "taking" clause applies to the States through the Fourteenth Amendment. See *United States ex rel. TVA v. Powelson*, 319 U.S. 266, 279 (1949); *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 235-41 (1897).

petitioned the Ninth Circuit Court of Appeals for rehearing with a suggestion for a rehearing En Banc. Respondents filed an Answer to the aforesaid Petition and on January 9, 1990, the Ninth Circuit Court of Appeals denied same [App. G-1].

Petitioner then petitioned this court for a Writ of Certiorari to the Ninth Circuit Court of Appeals.

REASONS FOR DENYING WRIT

The principal reasons why this court should not grant certiorari in this case are that:

(1) While petitioner poses a trilogy of interesting abstract questions for the court to answer, those questions have already been answered by this court in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987) [*Keystone*] and *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) [*First English*] and, therefore, need not be addressed again in this case; and

(2) The claimed conflicts between the decisions of the Ninth Circuit and other circuits, simply are not appreciable.

This case, therefore, does not meet any of the "special and important reasons" set forth in Supreme Court Rule 17 for granting certiorari.

What Petitioner has requested of the court is to issue an advisory opinion on the parameters of taking claims. To comply with contravene the constitutional and policy

prohibitions on the issuance of advisory opinions,[6] as well as the important policy laid down by this court through decades of experience, that the decision of whether a regulation constitutes a taking it over can be made after a careful analysis of the facts of each case. See *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978) [*Penn Central*]. That policy is of particular importance here, where the sole grounds of attack in the federal courts rest on the economic viability of remaining uses[7] an inquiry unique to the facts of each case.

The spring board for all questions presented by petitioner is the misguided belief that the courts takings analysis is in need of clarification. It is not. During the courts' 1987 Term[8] the takings analysis put forth initially in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) [*Mahon*] by Justice Holmes was adapted and reaffirmed. By accommodating the *Mahon* analysis, the court provided the requisite guidance for lower courts conducting

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[6] As the Court stated in *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268 (1969): "We do not sit, however, to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision" *Id.* at 284.

[7] At no time has petitioner been deprived of substantially *all* reasonable economic use of his property. Petitioner was allowed to construct his proposed buildings as originally designed [See App. H-1] and to use the entire lot, including the area designated for eventual street widening. He instead chose not to, and to this day has not done so. In fact respondents are informed and believe petitioner no longer resides or conducts business in California.

[8] During the 1987 Term the court decided *Keystone; Hodel v. Irving*, 481 U.S. 704 (1987); *First English*; and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) [*Nollan*].

taking analysis. What is needed now is further development by the lower courts of this court's analysis not reassessment of same again.

THE REGULATION HEREIN DOES NOT CONSTITUTE A COMPENSABLE TAKING

Probably the only general accepted maxim of modern takings analysis is that it is an ad hoc, fact oriented inquiry. *Keystone*, 480 U.S. at 495, citing *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) [*Kaiser Aetna*]; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982) [*Loretto*]. In *Penn Central*, 438 U.S. 104 (1978), the court admitted that it has been unable to develop any "set formula" for determining when the Constitution requires the government to compensate economic injuries caused by public action. 438 U.S. at 124.

Although the court has not endorsed a clear test to determine whether a land use restriction is a taking, three factors, derived from the *Mahon* analysis, have been emphasized by the court: (1) the character of the governmental action; (2) the economic impact of the regulation on the claimant and particularly; (3) the extent to which the regulation has interfered with investment-backed expectations. See *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986) [*Connolly*]. These factors, although derived from the *Mahon* analysis, have been shaped by the court during the 68 years since *Mahon* was decided.

In determining whether a challenged regulatory measure effects a taking, the court first assesses the character of a governmental action. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) [*Ruckelshaus*]; *Loretto*, 458 U.S. at

426; *Prune Yard Shopping Center v. Robbins*, 447 U.S. 74, 83 (1980); *Kaiser Aetna*, 444 U.S. at 175. When regulating the use of property pursuant to its police power, the government sometimes physically occupies the property, in whole or in part, and at other times simply regulates the landowner's use of the property. See *Penn Central*, 438 U.S. at 124. The court has held that where the government physically occupies the property, the action constitutes a taking. *Nollan*, 483 U.S. 825, 831-32 (1987); *Loretto*, 458 U.S. at 426. In contrast, where the government simply regulates the use of property, the court asks whether the provision sufficiently implicates the public interest. See *Penn Central*, 438 U.S. at 126-28. Where a particular regulation benefits the public, it is less likely that the government will be required to pay compensation.

A significant line of cases concerning regulatory enactments, decided after *Mahon*, gives much weight to the public interest implicated by a given regulation. The court has upheld legislative action, for instance, when dealing with public interest. In *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) [*Goldblatt*], the appellants owned a tract of land upon which they had mined sand and gravel for over 30 years, creating a large, deep, water filled crater. *Id.* at 591. The town amended its ordinance "to prohibit [mining] below the water table and to impose an affirmative duty to refill an excavation presently below that level". *Id.* at 582. The court, again, analyzing the issue under the Fourteenth Amendment, upheld the regulation as a valid exercise of the police power notwithstanding the fact that the regulation had *completely* destroyed the mining utility of the property. *Id.* at 593.

Thus, under the *Mahon* analysis, if a State legislature reasonably concluded that "the health, safety, morals or general welfare" of the public would be promoted by prohibiting particular uses of land, the pursuant regulation would *not* constitute a taking, even if it would adversely affect property rights. The court in *Goldblatt* noted, however, that a regulation may be "so onerous as to constitute a taking." *Id.* at 594; See also *Ruckelshaus*, 467 U.S. at 1011-14 [guarantees of confidentiality and exclusive use regarding trade secrets giving rise to reasonable investment-expectations and disclosure of such secrets constitutes taking]; *Armstrong v. United States*, 364 U.S. 40, 48 (1960) [government's action destroying value of the shipbuilder's liens constitutes taking].

The second factor the court considers in evaluating a given regulatory measure, and the focal one in *Mahon*, is the extent of economic loss suffered by the owner. See *Penn Central*, 438 U.S. at 124; *Mahon*, 260 U.S. at 414. While no clear line has been drawn as to the degree of loss requiring compensation, the court has noted that even severe loss in value does not necessarily constitute a taking. The court also has held that to determine the loss actually suffered, the party must be considered as a whole, not divided into its parts. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) [*Andrus*]; *Penn Central*, 438 U.S. at 136-37.

The economic inquiry also focuses on the reasonable investment-backed expectations of the owner. See *Connolly*, 475 U.S. at 226; *Ruckelshaus*, 467 U.S. at 1005. The landowner is protected from a change in land use regulations if he makes substantial expenditures on a developed project in good faith in reliance on a government act. The

court then assesses whether a regulation is a sharp reversal of a governmental stance, upon which the aggrieved owner specifically had relied by investing in the particular benefit that the questioned regulation would remove or destroy. Generally, where beneficial uses of the property remain, the court will not find interference with investment-backed expectations sufficient to constitute a taking. See *Andrus*, 444 U.S. at 66; *Penn Central*, 438 U.S. at 136. Further, the court tends to evaluate existing economic activities, rather than loss of future profits.

In *Penn Central* the court illustrated the application of its three part takings analysis. There, the court upheld a landmark preservation law that prohibited Penn Central Railroad from erecting an office building on top of Grand Central Terminal in New York City. The court employed its takings analysis to determine whether the government must compensate for economic injuries caused by landmarking, essentially regulating enactments made in the public interest.

With respect to the character of a governmental action, the court found that a "taking may more readily be found when the interference with property can be characterized as a physical invasion governed by government . . . than when interference arises from some public program as adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 138 U.S. at 124. The court further determined that it was a regulation in which the public interest was great. *Id.* at 109. It then considered the economic impact of the regulation on the claimant, and particularly, the extent to which the regulation interfered with investment-backed expectations. *Id.* While the claimants were not permitted to use

their ownership of air rights to build an office tower, the court stated that other reasonable, beneficial uses of a site remained. *Id.* at 138 n. 36. There was thus an insufficient interference with investment at expectations. *Id.* at 138. Because the regulations served a strong public interest, did not completely destroy the economic value of property, and did not substantially interfere with the reasonable investment-backed expectations, the Court held that the regulation did not constitute a taking. *Id.*

The current approach to takings law, then, encompasses an examination of both the purpose of the regulation and the devaluation of the property affected by the regulation. This frame work has developed from the analysis set forth by Justice Holmes in *Mahon*. The court first examines whether the regulation involves a physical intrusion onto the property. If so, the court finds a taking, regardless of the magnitude of the physical intrusion. If the government has simply regulated the use of property in question, the court then assesses whether or not the legislature has acted in the public interest. Where the regulation benefits the health, safety, or welfare of the public, the court evaluates the extent of economic harm suffered by the property owner. The taking inquiry thus has tended to focus primarily on the absolute or relative severity of the economic impact of the regulation on the complaining owner's interest rather than on regulatory purpose. However, contrary to petitioner's position herein,[9] the *Mahon* analysis contemplates, at least for a

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[9] Petitioner refers in his petition [Pet. 7,12] to the *Agins* [*v. Tiburon*, 447 U.S. 255 (1980)] test but same is nothing more than

(Continued on following page)

compensable taking, that the landowner prove, not only that the burdensome regulation precluded him from using his property, *but also* he must establish that the enactment of the regulation extended beyond the government's legitimate exercise of its police power.

In *First English*, the court clearly stated that evidence of *both* of the aforementioned factors is necessary to establish a compensable taking. Because the court's decision was based on the adequacy of the church's Complaint as a matter of law, and not as a resolution of facts in the case, the court cautioned:

> "We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of his property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as part of the State's authority to enact taking regulations. These questions, of course, remain open for decision on the remand to be directed today."

First English, 482 U.S. 304, 107 S.Ct. at 2384-85 (citations omitted). Justice Stevens in *First English* clearly agrees with the respondent's position. He maintains that "some sort of improper purpose or insufficient justification must be alleged in order to properly challenge the constitutionality of an ordinance." *Id.* at 2392 (Stevens, J.,

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the *Mahon* analysis. Interestingly, the Court in *First English* noted that it had earlier held that no taking occurred in either *McDonald Sommer and Frates v. Yolo County*, 477 U.S. 340 (1986) or *Agins* because it found the property owner's allegations of denial of all use were "false" as a matter of law. 482 U.S. at ___, 107 S.Ct. at 2384.

dissenting). Justice Stevens clearly limits the application of the majority opinion to instances where both of the aforementioned *Mahon* factors are met. He argues that the court, "does not, and could not under our precedents, hold that the allegation sufficiently allege a taking or that the county's effort to preserve life or property could ever constitute a taking." *Id.* at 2393 (Stevens, J., dissenting). In particular, Justice Stevens referred to the traditional nuisance exception to the takings doctrine, established in such cases as *Hadacheck v. City of Los Angeles*, 239 U.S. 394 (1915) [emissions from brick yard]; *Mugler v. Kansas*, 123 U.S. 623 (1887) [intoxicating liquors], whereby a health and safety regulation cannot constitute taking because all individuals hold property under an implied obligation to refrain from injurious or obnoxious uses of their property. *First English*, 107 S.Ct. at 2391 (Stevens, J. dissenting). The three dissenting members of the court in *First English* clearly feel that there can never be a taking without an improper and arbitrary exercise of the police power by the regulatory agency.

The decisions by the Fifth and Eleventh Circuits in *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981) [*Wheeler I*]; *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437 (11th Cir. 1984) [*Wheeler II*]; and *Wheeler v. City of Pleasant Grove*, 833 F.2d 267 (11th Cir. 1987) [*Wheeler III*] are not in conflict with the Ninth Circuit Court of Appeals in this case and are inapposite.[10] The Fifth Circuit in *Wheeler*

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[10] *Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986) is inapposite. There developer brought civil rights action against county based on county's delay in approving developer's preliminary plat application. The *First*

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I found that the enactment of the ordinance therein was a "bald attempt to revoke an already authorized building permit." 664 F.2d at 100. The court went on to state "findings by the trial court indicate this action was a confiscatory measure. Under *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1966), if a regulatory undertaking is confiscatory in nature, it is a taking." 664 F.2d at 100. There were further grounds for the finding of a taking, but, again, the gravamen of the *Wheeler I* decision was the good faith reliance on the prior permit approval and the sharp reversal based upon public out crying and condemnation of all apartment construction. *Wheeler II* did not decide that a taking occurred, but rather simply applied the "law of the case" doctrine. 746 F.2d at 1441. Lastly, *Wheeler III* dealt almost exclusively with how to calculate the compensation due when a taking has occurred. 833 F. 2d at 270.

The *First English* requirement of compensation for temporary takings presents a problem only to the extent that takings analysis is unpredictable. Based upon the court's decisions in *Keystone* and *First English* which reaffirm and to a certain extent re-formulate the *Mahon* analysis, a proper balance between the individual landowner's right to protection against severe economic loss and the need for legislatures to have some freedom in regulating

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English court characterized such a situation as a "quite different question" 482 U.S. ___, 107 S.Ct. at 2389.

Sederquist v. City of Tiburon, 765 F.2d 756 (9th Cir. 1984) [*Sederquist*], was a facial challenge wherein the court assumed that both of the so-called prongs of the *Agins* test could be met. Hence, even *Sederquist* is consistent with respondents' position.

the use of land has been set forth. There is no need for any further articulation of the exact parameters of the test to be employed. It is not the "either/or" test urged by petitioner, but rather a more flexible ad hoc fact oriented inquiry and its application therefore is unique to each case.

CONCLUSION

Respondents submit that the lower courts, based upon the foregoing, properly granted their Motion to Dismiss under *Federal Rules of Civil Procedure*, Rule 12(b)(6). Petitioner cannot plead, let alone prove any compensatory taking occurred.

Keystone and *First English* have preserved the analysis first set forth by Justice Holmes in *Mahon* and utilized by the court during the 68 year interim between these decisions. The Court in *Keystone* and *First English* has simply proven that the *Mahon* diminution in value test is eminently workable in the context of modern regulatory needs. By defining more clearly how the respective elements of the test are to be weighed, the court took a step toward eliminating inconsistent standards among lower courts.

The fact that no question has been presented here in which the court has not already long decided upon, or as a matter of conflict in reality between the Circuit Courts of Appeal, militates strongly in favor of denying and not granting the Petition for Writ of Certiorari herein.

DATED: May 8, 1990

Respectfully submitted,

MADORY, BOOTH, ZELL AND PLEISS
A Professional Corporation
LARRY T. PLEISS
17822 East 17th Street
Suite 205
Tustin, California 92680-2183
(714) 832-3772
Attorneys for Defendants and Respondents, City of Costa Mesa and the City Council of the City of Costa Mesa

APPENDIX

APPENDIX A

Gary A. MOORE, Plaintiff-Appellant,

v.

CITY OF COSTA MESA, et al., Defendants-Appellees.

No. 87-6432.

United States Court of Appeals, Ninth Circuit.

Argued Aug. 3, 1988.

Submitted Aug. 26, 1988.

Decided Sept. 26, 1989.

Terry M. Moshenko, Newport Beach, Cal., for plaintiff-appellant.

Richard Booth and Larry T. Pleiss, Madory, Booth, Zell and Pleiss, Tustin, Cal., for defendants-appellees.

Appeal from the United States district court for the Central District of California.

Before HALL and LEAVY, Circuit Judges, and GEORGE*, District Judge.

LEAVY, Circuit Judge:

OVERVIEW

The appellant Gary Moore (Moore) claims that a conditional variance requiring part of his property to be deeded to the City of Costa Mesa (the City) was a partial

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*The Honorable Lloyd D. George, United States District Judge for the District of Nevada, sitting by designation.

temporary taking in violation of the fifth amendment, for which he is owed compensation. The conditional variance ultimately was declared invalid by the California courts.

We affirm the decision of the district court that the conditional variance was not a violation of the takings clause for which compensation is owed.

FACTS

Moore owns two adjacent lots, each containing a house, on Wilson Street in Costa Mesa. Moore lives in one of the houses and runs his carpet installation business out of the other. In 1983, Moore requested a zoning variance from the city so he could construct a large commercial building on the two lots.

The City's master plan called for proposed widening of Wilson Street. The City granted Moore the zoning variance, but with the condition that he deed to the City that part of his land needed for the proposed widening project. The condition was part of a City policy[1] for proposed developments that would increase traffic on a street slated for widening. Approximately ten percent of Moore's entire parcel was needed for the proposed widening.

Moore unsuccessfully appealed the conditional variance to the Costa Mesa Planning Commission and to the City Council. He filed a petition for a writ of mandamus and a complaint for declaratory relief and damages

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[1] Costa Mesa Municipal Code, Article 22, Section 13-316, Street Dedications.

against the City in Orange County Superior Court. Moore requested: (1) the condition be set aside, (2) a declaration that the condition was unconstitutional, (3) damages for inverse condemnation, and (4) general damages and attorney's fees. The court granted Moore mandamus and declaratory relief, finding the evidence insufficient to support any relationship between the proposed widening project and the expansion of Moore's business premises. The court issued a peremptory writ forbidding the City to impose the condition. However, the Superior Court specifically found that the City's policy was not unconstitutional on its face. The Court of Appeals affirmed the decision and the California Supreme Court denied review.

In 1987, Moore sued in federal court under 42 U.S.C. § 1983, alleging his rights were violated under the takings clause of the fifth amendment and the equal protection clause of the fourteenth amendment, as well as his substantive and due process rights under the fourteenth amendment. Moore claimed the three year delay from 1983 to 1986 in obtaining a building permit was an unconstitutional temporary taking of his property, thereby entitling him to damages and attorney's fees and costs. The city moved to dismiss the complaint for failure to state a claim upon which relief can be granted under Federal Rules of Civil Procedure 12(b)(6).

The district court dismissed Moore's complaint with prejudice. The court *sua sponte* applied res judicata to Moore's claims, finding that he had presented a claim for money damages to the state court, and that the state court had rendered judgment adversely to Moore on that issue. Alternatively, the district court found that Moore had

failed to state a claim for a taking without compensation in violation of the fifth amendment. A motion for reconsideration was denied, and Moore appealed. On appeal, Moore argues only the takings claim.[2]

DISCUSSION

Standard of Review

A dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo. *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 552 (9th Cir.1984). Review is limited to the contents of the complaint. *Id.* A complaint should not be dismissed "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir.1985), *cert. denied*, 474 U.S. 1056, 106 S.Ct. 795, 88 L.Ed.2d 773 (1986).

Motions to dismiss for failure to state a claim must be viewed with particular skepticism in cases involving

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[2] The Superior Court of California did not decide whether Moore was entitled to compensation for the alleged temporary taking. Instead, after the court ordered the writ, found that the Code section was not unconstitutional, and awarded attorney's fees and costs, it stated "[a]ll other issues reserved for trial."

On appeal, the City conceded at oral argument that res judicata does not apply to the facts of this case. Therefore, we need not address the district court's application of this doctrine.

claims of inverse condemnation. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 864 F.2d 1475, 1478 (9th Cir.1989) (citing *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir.1986), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988)).

Whether Moore's Complaint States a Claim for Compensation

The fifth amendment guarantees that private property shall not "be taken for public use without just compensation." *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). It is established doctrine that " 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' " *First Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 316, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250 (1987) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922)). A taking may be found without any physical invasion where " 'a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of property. . . . ' " *Martino v. Santa Clara Water Dist.*, 703 F.2d 1141, 1147 (9th Cir.), *cert. denied*, 464 U.S. 847, 104 S.Ct. 151, 78 L.Ed.2d 141 (1983) (quoting *Richmond Elks' Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1330 (9th Cir.1977)). The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner the economically viable use of his land. *Agins*, 447 U.S. at 260, 100 S.Ct. at 2141 (citations omitted).

The governmental action that results in a taking of property necessarily implicates the " 'constitutional obligation to pay just compensation.' " *First Evangelical*, 482 U.S. at 315, 107 S.Ct. at 2386 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960)). The Supreme Court recently has held that compensation must be paid for the temporary regulatory taking of all of a person's property, until the time the regulation is invalidated by the courts. *First Evangelical*, 482 U.S. at 321, 107 S.Ct. at 2383, 2389.

However, not all regulatory invasions of property rights amount to unconstitutional takings. *See Martino*, 703 F.2d at 1146 (distinguishing regulations that invade property rights from unconstitutional takings). A regulation that adversely affects property values does not constitute a taking unless it destroys a major portion of the property's value. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496, 498, 107 S.Ct. 1232, 1248, 1249, 94 L.Ed.2d 472 (1987) (requirement that 27 million tons of coal not be mined is not a taking when this amount represents only 2% of owners' coal), *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296-97, 101 S.Ct. 2352, 2370-71, 69 L.Ed.2d 1 (1981) (mere enactment of regulatory statute not a taking because it does not categorically deny surface mining and does not regulate alternative uses to which the lands may be put), *see also Agins*, 447 U.S. at 260, 100 S.Ct. at 2141 (1980) (whether there is an unconstitutional taking depends on whether ordinance does not substantially advance legitimate state interests, or denies an owner the economically viable use of his land), *Citizens Ass'n of Portland v. International Raceways, Inc.*, 833 F.2d 760, 762 (1987) (whether

there is an unconstitutional taking depends on whether the owner has been deprived of his property's economically viable use). Further, "[m]ere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.' " *Agins*, 447 U.S. at 263 n.9, 100 S.Ct. at 2143 n. 9 (quoting *Danforth v. United States*, 308 U.S. 271, 285, 60 S.Ct. 231, 236, 84 L.Ed. 240 (1939)), *accord First Evangelical*, 107 S.Ct. at 2388. Finally, loss of anticipated gains or future profits is not usually sufficient to constitute a taking. *Andrus v. Allard*, 444 U.S. 51, 66, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979).

In his complaint, Moore alleges he suffered damages during the time the conditional variance was imposed, because "the costs of development and construction of the improvements contemplated . . . has increased substantially in value and Moore has suffered additional losses due to lack of ability to use the Subject Property during said period." Complaint at 5, para. 16. Moore claims damages in excess of $25,000. It is significant that there are no allegations that all Moore's property was taken, or that he was denied all or substantially all of its economically viable use, or that there was an unreasonable delay in the decision-making process.

Despite Moore's citations to the recent Supreme Court and Ninth Circuit decisions in *First Evangelical* and *Martino*, these cases do not support Moore's claim that his inability to develop his property constituted an unconstitutional regulatory taking for which compensation must be paid. In *First Evangelical*, an interim ordinance prohibited the construction or reconstruction of buildings

for the church's retreat center, which had been destroyed by a flood. 482 U.S. at 307, 107 S.Ct. at 2381-82. The complaint alleged that the interim ordinance "denies all use of [the property]." 482 U.S. at 308, 107 S.Ct. at 2384. The Court decided that compensation must be paid for the time the interim ordinance was in effect because it denied *all* use of property. 482 U.S. at 321, 107 S.Ct. at 2389. The Court explicitly did not extend its holding to cases like Moore's: "We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *Id.*

Like *First Evangelical*, this circuit's decision in *Martino* also involved allegations that the landowners had been deprived of all of their property's reasonable economic uses, by ordinances requiring permits and dedications for a flood control project before any development could occur. The complaint alleged that the Martinos' property "has been deprived of all of its reasonable beneficial economic uses and its economic return and marketability. . . . " 703 F.2d at 1144. We reversed the district court's grant of summary judgment to the Santa Clara Valley Water District, finding that the complaint alleged facts which, if true, could constitute a taking. *Id.* at 1142.

Unlike the regulations in *First Evangelical* and *Martino*, the conditional variance at issue here affected only a small portion ~~of~~ Moore's property. Moore does not allege that his ongoing carpet contracting business was in any way adversely affected by the conditional variance. Thus, he does not allege he was deprived of substantially all

reasonable use of his property. While the California courts determine that the conditional variance invaded Moore's property rights, this was not an "invasion" of sufficient magnitude to have denied Moore the "justice and fairness" guaranteed by the fifth and fourteenth amendments. *See Martino*, 703 F.2d at 1146.

The Supreme Court's decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), also does not support Moore's position. As Moore concedes, in *Nollan* the Court did not decide whether damages could be recovered for the time a conditional coastal development permit was in effect. The Court merely declared invalid the conditional permit, which required a public easement across a beach before a new house could be constructed. 107 S.Ct. at 3148-50.

Consequently, even taking all Moore's allegations as true, construing them in the light most favorable to him, and viewing the dismissal with skepticism, it appears beyond doubt that Moore can prove no set of facts in support of his claim which would entitle him to relief. His allegations are insufficient to state a claim for unconstitutional regulatory taking for which compensation is due, and there is no case law that supports his position. The district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim was proper.

AFFIRMED.

APPENDIX B

Gary MOORE, Plaintiff,

v.

CITY OF COSTA MESA, et al., Defendants.

No. CV-87-1125 MRP.

United States District Court,
C.D. California.

Aug. 26, 1987.

Hugh R. Coffin, Pizer & Michaelson, Inc., Santa Ana, Cal., for plaintiff.

Larry T. Pleiss, Madory, Booth, Zell & Pleiss, Tustin, Cal., for defendants.

AMENDED MEMORANDUM OF DECISION

PFAELZER, District Judge.

This Court heard oral argument on plaintiff Gary Moore's motion for a new trial on August 10, 1987. Having read the papers submitted and considered the arguments contained therein, the Court denies plaintiff's motion.

I. *Facts*

Plaintiff Gary Moore owns two adjacent lost within the defendant City of Costa Mesa. At present, there are houses on each of the two lots.[1] Moore lives in one house,

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[1] The record does not reflect whether Moore has torn down the houses and begun to construct his office (continued)

and used the other for his carpet installation business. In late 1983, Moore requested zoning variances to build a large commercial building with both warehouses and office space, on the two lots. Moore's lots front on Wilson Street in Costa Mesa. The city's master plan calls for the eventual widening of Wilson Street. The city granted Moore his zoning variance and permits on the condition that he deed over to the city the land necessary for the widening of Wilson Street. This land represented just over ten percent of Moore's entire parcel. The city required this condition as part of a stated policy covering situations in which a proposed new development would increase traffic on a street that needed widening. Moore unsuccessfully appealed to the Costa Mesa Planning Commission and to the City Council. On May 21, 1984, having exhausted his administrative remedies, Moore sued the city in Orange County Superior Court requesting (1) mandamus to set aside the condition; (2) declaratory relief that the condition was invalid; (3) damages for inverse condemnation; and (4) general damages and attorney's fees. The Superior Court, which reviews zoning decisions under a "substantial evidence" standard, granted Moore mandamus and declaratory relief. It held that the city's policy was not reasonably related to the relatively small projected increase in traffic from the new building. Moore states that he decided to abandon his claims for damages in the Superior Court, although he

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building. However, it is clear that the parties do not dispute that Moore had the use of the houses for the entire period of the alleged taking, from 1983 until 1986.

24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979), *aff'd*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). *Agins*, in a portion of the opinion which was not reviewed by the U.S. Supreme Court, held that money damages are not available as a remedy for overly restrictive zoning. This portion of *Agins* was recently overruled in *First English Evangelical Lutheran Church v. County of Los Angeles*, ___ U.S. ___, 107 S.Ct. 2378, 2387-89, 96 L.Ed.2d 250 (1987). *First Church* held that even a "temporary taking" between the enactment and judicial invalidation of an overly-restrictive land use ordinance could be compensable under the Fifth Amendment. *See id.*

Res judicata bars relitigation in federal court of any state court judgment to the same extent that the state would bar relitigation. *See Heath v. Cleary*, 708 F.2d 1376, 1379 (9th Cir.1983), 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4469 (1981). Moore argues that in light of *Agins*, pressing his claim for money damages in state court would have been futile. However, Moore cites no cases in support of a "futility" exception to the principle of res judicata. Generally, a change in controlling law will not provide an exception to res judicata. *See Federated Dept. Stores v. Moitie*, 452 U.S. 394, 398-401, 101 S.Ct. 2424, 2427-29, 69 L.Ed.2d 103 (1981); *Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499, 1503-04 (11th Cir.1984), *cert. denied*, 469 U.S. 1191, 105 S.Ct. 966, 83 L.Ed.2d 970 (1985); *In re Tennessee Central Ry. Co.*, 498 F.2d 904, 906 (6th Cir.1974). In any case, Moore's claim for damages was not necessarily futile. If he had been unsuccessful in the Superior Court, he could have pressed his claim on appeal, and, if unsuccessful,

petitioned for certiorari to the United States Supreme Court. This is exactly what happened in *First Church*.

Under California law, res judicata applies not only to those claims actually litigated in a prior proceeding, but also to those which could have been litigated as part of that cause of action. The case of *Hatch v. Bank of America*, 182 Cal.App.2d 206, 5 Cal.Rptr. 875 (1960) is instructive. In that case, the plaintiff successfully brought suit to obtain possession of a truck. In a later suit, the plaintiff sought damages for use of the truck during the period of its conversion. The Court dismissed the second suit as barred by res judicata on the ground that the same fundamental set of facts had been presented in the first action. The Ninth Circuit has expressly applied this rule in cases like this one where the plaintiff first brings a state court action for mandamus, and later seeks damages in the federal courts. In *Clark v. Yosemite Community College Dist.*, 785 F.2d 781, 786 (9th Cir.1986), the court held the fact that the plaintiff abandoned his claim for damages in state court did not negate the binding effect of that judgment as res judicata. Claim preclusion applied wherever, as here, there is an identity of facts with those in a previous action. *See McClain*, 793 F.2d at 1033. The fact that a plaintiff requests a different type of relief, or even presents a different legal theory, does not negate or lessen the binding effect of the previous state court judgment.[3]

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[3] To the extent that Moore argues that the state court judgment was in error, the lower federal courts do (continued)

Therefore, the Court holds that Moore's claim for damages under § 1983 is barred by the res judicata effect of his state court judgment.

IV. *The Merits*

In the alternative, the Court holds that Moore has failed to state a claim for taking without just compensation in violation of the Fifth Amendment.[4] *First Church* has changed the landscape somewhat in the area of takings law. *See also, Nollan v. California Coastal Comm'n*, ___ U.S. ___, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

In *First Church*, a flash-flood wiped out a campground belonging to the church. The County Council then passed an ordinance totally barring any construction where the flood had occurred. The church sued for damages, claiming that this ordinance effected a taking of its property, which was entirely within this floodplain. The state court dismissed the damage claim, holding that

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not sit as courts of appeal for state court judgments. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *cf. Pennzoil Co. v. Texaco, Inc.*, ___ U.S. ___, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987). To the extent that he argues that the application of res judicata leaves a wrong without a remedy, this contention is incorrect. Moore effectively waived his remedy by not pursuing it in the state court proceeding.

[4] The Fifth Amendment is applied to the states by the Fourteenth Amendment. *Chicago, B. & Q.R.R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

even if the ordinance was invalid, such a temporary taking (from the time of enactment until the judicial invalidation of the ordinance) was not compensable in money damages, on the authority of the Supreme Court of California in *Agins*. The United States Supreme Court overruled, holding that a total government ban on the use of a property, even if temporary in duration, could constitute a "taking" for the purpose of the Fifth Amendment, and must be monetarily compensated. *See First Church*, 107 S.Ct. at 2387-88; *see also Martino v. Santa Clara Valley Water District*, 703 F.2d 1141 (9th Cir.) (same), *cert. denied*, 464 U.S. 847, 104 S.Ct. 151, 78 L.Ed.2d 141 (1983).

First Church is like this case in that it involves government overregulation of temporary duration.[5] However, *First Church* is unlike this case in that it involved a complete taking of the property at issue. In *First Church*, the appellant was completely unable to use its campground as a result of the ordinance at issue. *Martino* likewise involved a situation in which there had been a complete taking; the landowners in that case were completely unable to use two undeveloped lots across which the local water district planned to route a floodway. *See* 703 F.2d at 1143-44.[6] In contrast, in this case, Moore has

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[5] Defendants do not contest that Moore has exhausted all of the remedies available to him under state law. *Compare MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

[6] In *Martino*, the property at issue " 'had[d] been deprived of all of its reasonable beneficial economic uses and its economic return and marketability,' " 703 F.2d at 1144.

been able to continue to use his property for his home and business; he has merely been unable to build a new and more profitable building to replace the current buildings.[7]

Moore argues in response that he city's action did constitute a total taking of the strip of his land nearest Wilson Street. However, as the Supreme Court stated in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), " '[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether . . . a taking [has occurred], this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole[.]" *See id.* at 130-31, 98 S.Ct. at 2662; *see also Keystone Bituminous Coal Ass'n. v. DeBenedictis*, ___ U.S. ___, 107 S.Ct. 1232, 1248, 94 L.Ed.2d 472 (1987); *Andrus v. Allard*, 444 U.S 51, 65-66, 100 S.Ct. 318, 326-27, 62 L.Ed.2d 210 (1979). The proper focus is on Moore's entire parcel of land, and it is clear that the city's condition did not constitute a taking of Moore's entire parcel.

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[7] At oral argument on the motion to dismiss, Moore contended that the City's action had effectively denied him all use of his property during the pendency of his state court lawsuit. After the Court pointed out that the complaint and the record of the state court action (which Moore appended to the complaint) revealed that this was not so, Moore conceded at the motion for a new trial that he had had use of the two houses during the period at issue.

Moore does not allege any actual physical invasion of his property; rather, he alleges a regulatory taking. *Compare Loretto v. Teleprompter Manhatten CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).[8] It is settled that government regulation does not constitute a taking merely because it affects the value of a property. *See Agins*, 447 U.S. at 263 n.9, 100 S.Ct. at 2143 n. 9; *Danforth v. United States*, 308 U.S. 271, 285, 60 S.Ct. 231, 236, 84 L.Ed. 240 (1939).[9] Regulation only constitutes a taking if it " 'denies an owner economically viable use of his land' " or if it " 'interfere[s] with reasonable investment backed expectations' " in that use. *DeBenedictis*, 107 S.Ct. at 1247 (citations omitted) (holding that Pennsylvania's anti-subsidance act limiting the operation of coal mines

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[8] *Nollan*, 107 S.Ct. 3141, like this case, involved a governmental body's attempt to acquire an easement over part of a parcel of real estate in return for permitting the landowners to develop the remainder of the parcel. Also like this case, the governmental body's condition of development was not reasonably related to the burdens imposed by the new development, and as a result constituted an unconstitutional taking unless the owners were paid just compensation. However, the landowners in *Nollan* did not assert that they were entitled to damages for the period of time prior to the invalidation of the ordinance, and the Supreme Court did not indicate that they were entitled to such damages. The Court held only that the permanent imposition of the condition at issue would constitute a taking without just compensation, *id.* at 3146-48. In any case, without the requested building permits, the landowners in *Nollan* were apparently deprived of any use of the property (the only building on the property had become uninhabitable), unlike Moore in this case. *Id.* at 3143.

[9] Were this not the case, not only would all zoning ordinances constitute takings, so too would government decisions concerning spending, taxation, and money supply, all of which can and do affect the value of real estate.

did not effect a taking).[10] The appellant in *First Church* successfully pled this; Moore has not and cannot. He pleads that the expense of building his improvements increased during the delay and that he lost the use of the improvements for the period of the delay. These losses do not rise to the level of an unconstitutional taking. *See DeBenedictis*, 107 S.Ct. at 1247. Therefore, Moore's complaint fails to state a claim and his motion for a new trial must be denied.

IT IS THEREFORE ORDERED that plaintiff's motion for a new trial is denied.

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[10] The standards applied in *DeBenedictis* are well-settled law. *See Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

APPENDIX C

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GARY L. MOORE, Plaintiff and Respondent. v. CITY OF COSTA MESA, Defendant and Appellant.	G002071 (Super. Ct. No. 42-99-35) OPINION

APPEAL from a judgment of the Superior Court of Orange County. Judith M. Ryan, Judge. Affirmed.

Thomas C. Wood, City Attorney, and Eleanor M. Frey, Assistant City Attorney, for Defendant and Appellant.

Pizer & Michaelson, Inc., and Hugh R. Coffin for Plaintiff and Respondent.

May a city require a landowner to dedicate a portion of his land for street widening as a condition of granting a conditional use permit? Yes, but only if substantial evidence exists showing a reasonable relationship between the landowner's proposed use and the dedication requirement.

Moore owns two adjoining lost, containing 12,862 square feet with a 107 foot frontage, on Wilson Street in the City of Costa Mesa ("the City"). Wilson Street is currently 40 feet wide curb-to-curb in 60 foot

right-of-way. The City's Master Plan of Highways shows that Wilson Street will eventually be widened to a 70 foot street in an 84 foot right-of-way.

On streets where the Master Plan requires additional property for street widening. Costa Mesa Municipal Code Section 13-316 requires land dedication for street widening as a condition to granting a building permit over $2,000.[1] In applying section 13-316, the City's Planning District analyzes the proposed development to determine the vehicle traffic it will generate. If the proposed development increases traffic flow, the dedication requirement is imposed. If not, the requirement is waived, or the developer may seek a variance.

Moore's lots are zoned C1. local business district. Commercial properties abut Wilson Street on both sides. A medium density condominium complex is behind the lots. At present, two older houses are on the lots; Moore lives in one and uses the other as an office and storage facility for his carpet installation business, under a conditional use permit ("CUP"). (Carpet contracting is not a permitted use under C1 zoning, but maybe allowed under a conditional use permit.)

In late 1983, Moore requested zoning variances for a permit to build a 6.621 square-foot building on the two lots: a 3,528 square foot warehouse with 3,028 of office space on a second floor. He also requested a new CUP to allow his business to occupy the proposed building. In

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[1] At the trial level, Moore challenged the constitutionality of section 13-316. The court found the section to be constitutional on its face. Moore did not appeal this decision and we do not address it here.

analyzing Moore's variances requests, the Planning District used the City's General Plan Traffic Study to determine the anticipated traffic load which a typical 6,621 square foot C1 building would generate. The Staff estimated that Moore's building would generate 230 "trip-ends" (vehicle arrivals or departures). 191 more trip-ends than the estimate for the current structures. The Staff recommended denying Moore's requested variance from the dedication requirement since Moore's development would create an estimated 600% increase in traffic at the site.

After holding public hearings in January 1984, the City's Planning Commission granted Moore's building permit and CUP, but denied the variance from the dedication provision which required Moore to dedicate the 12 foot Wilson Street frontage to complete the 84 foot right-of-way. The dedication area, 1,308 square feet, is 10.17% of the lots' total area.

Moore appealed from the Commission's decision to the Costa Mesa City Council. The Council held a public hearing in February 1984 and granted the permits subject to the same conditions.

Moore petitioned the superior court for an administrative writ of mandamus, challenging the dedication requirement's validity. (Code Civ. Proc., § 1094.5) The court granted the writ, finding the evidence in the record insufficient to establish a reasonable relationship between the dedication requirement and Moore's proposed development. The City now appeals.

This appeal's primary issue is the sufficiency of the evidence on the dedication's reasonableness. It is now

well-established that a governmental body may require dedication as a condition for property development as long as the dedication is reasonably related to the requested use. (*Associated Home Builders, etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 639 et seq.; *Ayres v. City Council of City of Los Angeles* (1949) 34 Cal.2d 31, 41-42; *Remmenga v. California Coastal Com.* (1985) 163 Cal.App.3d 623, 627-628; Gov. Code, § 65909.) The question before us is threefold: (1) whether substantial evidence supported the City's finding that Moore's project would increase traffic; (2) whether the dedication is reasonably related to the traffic increase; and (3) who decides (1) and (2). We will consider these questions in reverse order.

The City has the statutory authority to control land use planning. (Gov. Code, §§ 65000 et seq.; *Bownds v. City of Glendale* (1980) 113 Cal.App.3d 875, 880-881.) When an administrative decision does not involve any fundamental vested right, the trial court should only review the administrative record to determine whether the findings are supported by substantial evidence. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 144.) The Planning Commission's dedication requirement does not involve any fundamental vested right. Acquisition of a vested right to construct a building requires (1) a building permit, and (2) substantial expenditures in reliance on the permit. (*Santa Monica Pines, Ltd. v. Rent Control Board* (1984) 35 Cal.3d 858, 864.) Moore has no inherent vested right to a use permit; development of land is a privilege, not a right. (See *Sommers v. City of Los Angeles* (1967) 254 Cal.App.2d 605, 620.)

Therefore, the trial court's review was limited to examining the administrative record to insure that the

City's decisions were supported by substantial evidence. On appeal, our review is identical. (*Bixby v. Pierno, supra,* 4 Cal.3d at p. 149.) We may not weigh the evidence in the administrative record (*Hingsbergen v. State Personnel Board* (1966) 240 Cal.App.2d 914, 916-917), and we must indulge all reasonable inferences supporting the City's decision. (*Sommers v. City of Los Angeles, supra,* 254 Cal.App.2d at p. 610.) It is Moore's burden to show that the City abused its discretion, that is, that the evidence is insufficient to support the City's decision. (*Bringle v. Board of Supervisors* (1960) 54 Cal. 2d 86, 89.)

Moore failed to show the evidence insufficient to support the City's finding regarding the projected traffic increase. The main evidence before the City and trial court was the Planning District projection that Moore's development would generate 191 additional trip-ends. This projection was based upon a traffic study prepared for the City by independent professional urban planners. Moore presented no evidence that the study was unreliable or incorrect. He merely asserted that it did not accurately predict his specific business' traffic potential. The relevant concern, however, is the *building's potential for traffic generation, not Moore's* potential for traffic generation as its tenant. For planning to be at all effective, the City must consider the reasonably anticipated future demands which a project will place upon the traffic system. (See *Ayres v. City Council of Los Angeles* (1949) 34 Cal.2d 31, 41.)

Nevertheless, the trial court did not err in finding no reasonable relationship between the projected traffic increase and the dedication. A dedication is reasonable if it will help fulfill public needs emanating directly from the

proposed use. (*Ayres v. City Council of Los Angeles, supra,* 34 Cal.2d at p. 42; *Scrutton v. County of Sacramento* (1969) 275 Cal.App.2d 412, 421-422.) We fail to see any direct, reasonable relationship between an increase of 191 trip-ends (95.5 cars) per day and a public need for street widening. Even indulging all reasonable inferences in the City's favor, this small traffic increase does not, by itself, justify the dedication. We recognize that a developer may be required to contribute to the cost of an eventual public need by forced dedication even if the individual development alone does not create the need, but the projected need and the dedication must be reasonably related to the proposed development. (*Associated Home Builders, etc., Inc. v. City of Walnut Creek, supra,* 4 Cal.3d at pp. 637-640; *Remmenga v. California Coastal Commission, supra,* 163 Cal.App.3d 623, 628-630.) A city may consider the incremental effect of a single project in evaluating that project's impact on the entire traffic system. Nevertheless, the single project must contribute to the public need in a way which makes the actual dedication reasonable. Otherwise, any incremental increase in traffic from a proposed development, however small, could trigger a forced dedication for street widening. "An arbitrarily conceived exaction will be nullified as a disguised attempt to take private property for public use without resort to eminent domain . . . . [Citations.]" (*Scrutton v. County of Sacramento, supra,* 275 Cal.App.2d at p. 421.) We agree with Moore and the trial court that the projected increase of 191 trip-ends, while theoretically related to the eventual need for street widening, was not reasonably related to the forced dedication in this case.

The judgment and writ of mandamus are affirmed.

NOT TO BE PUBLISHED

Trotter/s/
TROTTER, P.J.

I concur:

Sonenshine/s/
SONENSHINE, J.

Crosby, J., dissenting.

I dissent. Although this project would not create an immediate need to widen Wilson Street, it was lawful for the city to consider the cumulative impact of future development to exact the dedication of the easement in exchange for the conditional use permit. (*Ayres v. City Council of Los Angeles* (1949) 34 Cal.2d 31; *Associated Homebuilders, etc., Inc. v. Walnut Creek* (1971) 4 Cal.3d 633.) The burden on the land represented by the easement would be very slight until the future development occurs and the land is actually utilized: The city is willing to allow it to be used for parking or landscaping in the meantime. When the street is improved, respondent's property will share in that benefit.

95 additional car trips a day do not seem many; but if only four new businesses on respondent's side of street and five more on the other were to generate similar numbers, the city would be faced with a *thousand* more trips a day from this one block. Multiplied by perhaps dozens of similar blocks, the congestion might approach the gridlock conditions now common on many local streets. After the fact the city will find it difficult or impossible to improve the street in this post-Proposition 13 era; for then it may be widened only by condemning a

great deal of improved property, possibly including some of the new buildings themselves.

The majority's holding is clearly against the trend of current case law. (See, e.g., *Paoli v. California Coastal Com.* (Feb. 21, 1986, A028421) ___ Cal.App.3d ___; *Nollan v. California Coastal Com.* (Feb. 18, 1986, B004663) ___ Cal. App. 3d ___; *Grupe v. California Coastal Com.* (1985) 166 Cal.App.3d 148; *Remmenga v. California Coastal Com.* (1985) 163 Cal.App.3d 623.) It will also, if applied in other cases, seriously hamper Costa Mesa's efforts to plan for the future of all its citizens, including respondent whose property must someday lose much of its value when it looks out upon a parking lot anachronistically named "Wilson Street."

I would reverse.

Crosby, J.

APPENDIX D

PIZER & MICHAELSON INC.
Attorneys at Law
2122 North Broadway, Suite 100
Santa Ana, California 92706
(714) 558-0635

Attorneys for Plaintiff and Petitioner Gary L. Moore

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

GARY L. MOORE, Plaintiff & Petitioner, vs. THE CITY OF COSTA MESA, etc., et al., Defendants & Respondents.	)	CASE NO. 42 99 35 JUDGMENT ON PETITION FOR WRIT OF MANDAMUS (Filed Nov 13, 1984)

This cause came on regularly for hearing on Notice of Petitioner's Application for Writ of Mandamus on August 28, 1984 at 9:30 a.m. in Department 22 of the above-entitled court, the Honorable Judith M. Ryan, Judge Presiding, sitting without a jury. Petitioner appeared by his attorney, Hugh R. Coffin of Pizer & Michaelson Inc. Respondents appeared by their attorney, Eleanor M. Weaver, Assistant City Attorney of the City of Costa Mesa. The Court received the entire Administrative Record in this cause, heard argument of counsel and the matter having been submitted for decision,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. There is insufficient evidence in the Record to support the imposition of Condition No. 11 (the condition which requires dedication of additional right of way for the widening of West Wilson Street) as a condition to approval of Petitioner's Application, designated as ZE-83-169;

2. Specifically, the Court finds that there is insufficient evidence as to the "relationship between the exaction and the proposed use." *Ayres v. City Council of Los Angeles* (1949) 34 Cal.2d 31, 207 P.2d 1;

3. A Peremptory Writ of Mandate shall be issued and directed to Respondent, City of Costa Mesa, and the City Council of the City of Costa Mesa commanding Respondents, and each of them, immediately after receipt of the Writ to set aside the decision made by Respondent, City Council, on February 21, 1984 insofar as it imposes condition No. 11 of approval requiring Petitioner to dedicate all land 42' south of the center line of West Wilson Street to the City of Cost Mesa;

4. The Writ shall further command Respondents to reconsider the matter in light of this Judgment and the findings contained herein;

5. The Court does not find that the Costa Mesa Municipal Code, Article 22, Section 13-316 Street Dedications is unconstitutional on its face;

6. Petitioner shall have and recover from Respondent the sum of $1,500.00 as and for attorney's fees pursuant to §800 of the California Government Code;

7. Petitioner's request for attorney's fees pursuant to California Code of Civil Procedure §1021.5 is denied;

8. Petitioner shall have and recover from Respondent Petitioner's costs and disbursements in this proceeding for preparation of the Administrative Record, filing fees and related court costs in the sum of $469.15.

All other issues reserved for trial.

Dated: Nov 6 1984

/s/ Judith M. Ryan
JUDGE OF THE
SUPERIOR COURT

APPENDIX E

RELEVANT CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V, provides in part:

> "[N]or shall private property be taken for public use without just compensation."

United States Constitution, Amendment XIV, provides in part:

> "[N]o state shall . . . deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

RELEVANT STATUTE

The Civil Rights Act of 1871, 42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceedings for redress."

RELEVANT CODE

Costa Mesa Municipal Code, Section 13-316 provides:

> "Wherever the approved and up-to-date master plan of streets and highways for the City of Costa Mesa indicates that additional private property is required for street-widening purposes, property dedications must be made by

the owner of said property prior to the granting of any building permit for over two thousand dollars ($2,000.00) in improvements on any one lot, legal description, or ownership in any one twelve-month period. Wherever the public convenience and necessity may be served, the city shall have the power to grant encroachment permits to the owner for the use of that portion of the property dedicated as heretofore set out, said encroachment permits being for uses other than permanent structures or improvements by said property owner."

APPENDIX F

HUGH R. COFFIN
a member of
PIZER & MICHAELSON INC.
ATTORNEYS AT LAW
2122 NORTH BROADWAY, SUITE 100
SANTA ANA, CALIFORNIA 92706
(714) 558-0535

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GARY L. MOORE, Plaintiff, -vs- CITY OF COSTA MESA, a municipal corporation, THE CITY COUNCIL OF THE CITY OF COSTA MESA, and DOES I through X, Inclusive, Defendants,	CIVIL CASE NO. CV 87-1125 MRP (TX) COMPLAINT FOR DEPRIVATION OF CIVIL RIGHTS, DENIAL OF EQUAL PROTECTION OF THE LAW, DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW (CIVIL RIGHTS) (Filed Feb. 20, 1987)

Plaintiff, GARY L. MOORE ("MOORE") alleges as follows:

1. This action arises under the Civil Rights Act of 1871, 42 U.S.C. Section 1983 as hereinafter more fully appears. This Court has jurisdiction over this matter under 42 U.S.C. Section 1983 and 1988 and 28 U.S.C. Sections 1331 and 1343.

2. This is a Civil Action in which Plaintiff, GARY L. MOORE, seeks damages against Defendants CITY OF COSTA MESA, and CITY COUNCIL OF THE CITY OF COSTA MESA (hereinafter collectively referred to as "CITY") for deprivations of MOORE's rights, privileges and immunities under the First, Fifth and Fourteenth Amendments of the United States Constitution.

3. At all times relevant herein, MOORE was, and now is, a citizen of the United States and a resident of the County of Orange, California.

4. At all times mentioned herein, Defendant CITY was, and now is, a municipal corporation organized and existing under the laws of the State of California.

5. MOORE owns certain real property located in the City of Costa Mesa, with a common street address of 221 and 225 West Wilson Street, Costa Mesa, California, and identified as Assessor Parcel Numbers AP 419-012-25 and 419-012-26 (hereinafter collectively "Subject Property").

6. The CITY COUNCIL of the CITY OF COSTA MESA at all times mentioned herein has been and now is a legislative body of the CITY OF COSTA MESA, and at all times mentioned herein has been, and now is, charged under the provisions of the Municipal Code of the CITY OF COSTA MESA as the body to hear appeals and make final administrative decisions and determinations in regard to applications for conditional use permits and interpretation of the provisions of the planning, zoning and development provisions of the Municipal Code of the City of Costa Mesa.

7. On or about February 21, 1984, the CITY COUNCIL OF THE CITY OF COSTA MESA considered the appeal of MOORE in regard to an application for a conditional use permit to improve the Subject Property. On or about February 24, 1984, the City Clerk of the CITY mailed to MOORE a notice of the decision of the CITY COUNCIL of the CITY in regard to MOORE's application.

8. The decision of the CITY COUNCIL of the CITY was invalid as to MOORE, and the CITY COUNCIL abused its discretion and denied MOORE his rights, privileges and immunities secured by the First, Fifth and Fourteenth Amendments of the United States Constitution to own, use and develop property free from unreasonable restrictions or conditions as to the use or development of the subject property. The conditions imposed by the CITY COUNCIL of the CITY for development of the subject property included the requirement, as a pre-condition for development, for an unlawful dedication of more than ten percent (10%) of the land area of the Subject Property and MOORE, furthermore, was required to re-design his project and the layout of the structures to be improved on the Subject Property to comply with additional requirements of the CITY. The CITY COUNCIL of the CITY, furthermore, unreasonably and unlawfully restricted the uses of the Subject Property beyond that which is lawful and otherwise damaged MOORE's interest in and right to the reasonable use and development of the Subject Property.

9. On May 21, 1984, MOORE filed a petition for Writ of Mandamus and Complaint for Declaratory Relief and Damages in the Superior Court of the State of California,

in and for the County of Orange, denominated as Case No. 42 99 35.

10. The Honorable Judith M. Ryan, Judge of the Superior Court of the State of California for the County of Orange, ordered that a Writ of Mandamus issue and a Writ issued in this case on or about November 15, 1984. The terms of the Writ are contained in a true and correct copy of the Peremptory Writ of Mandamus which is attached hereto, marked Exhibit "A" and incorporated herein by this reference.

11. Thereafter, CITY appealed the decision of the trial court to the Court of Appeal of the State of California, which affirmed the decision of the trial court by an opinion filed March 24, 1986. A true and correct copy of said opinion is attached hereto, marked Exhibit "B" and incorporated herein by this reference.

12. Thereafter, CITY petitioned the Court of Appeal for rehearing, which was denied April 11, 1986.

13. Thereafter, CITY petitioned the California Supreme Court for review, which petition was denied July 20, 1986. A true and correct copy of the denial of the petition for review by the California Supreme Court is attached hereto, marked Exhibit "C" and incorporated herein by this reference.

14. MOORE is informed and believes and thereon alleges that the law of the State of California is such that it will not permit MOORE to recover interim damages for the loss of use and the ability to reasonably develop the Subject Property between the date of the unreasonable restriction and the date the restriction is ended, under the

laws of the State of California and the United States in that the decision by the California Supreme Court in *Agins v. Tiburon* (1979), 24 Cal. 3d 266; 157 Cal. Rptr. 372, limits the ability of MOORE in State Court to an action in mandamus and for recovery of costs only and MOORE may not recover damages or attorneys fees, and the only remedy available to MOORE is a federal action.

15. The conduct of the CITY constituted a judicially determined overregulation of the use of the Subject property in violation of the First, Fifth and Fourteenth Amendments of the United States Constitution. This conduct was established by the trial court and affirmed by the Court of Appeal of the State of California.

16. As a direct, consequential and proximate result of the conduct of the CITY, MOORE has suffered damages in the inability to use his property for the period of time between the first imposition of the restriction in the case of the Subject Property and the date the restriction is ended, during which period of time the cost of development and construction of the improvements contemplated by MOORE has increased substantially in value and MOORE has suffered additional losses due to lack of ability to use the Subject Property during said period.

17. As a result of said conduct, MOORE has been damaged in an amount in excess of $25,000.00, and will be established according to proof. Said conduct of the CITY constituted taking of property of MOORE without due process of law in violation of the First, Fifth, and Fourteenth Amendments of the United States Constitution.

18. As a result of said conduct, MOORE has been damaged in an amount in excess of $25,000.00, and will be established according to proof. Said conduct of the CITY constituted "denial of equal protection of the law" for "due process" in violation of the First, Fifth, and Fourteenth Amendments of the United States Constitution.

19. MOORE has been required to retain an attorney to protect his interests and MOORE is entitled to recovery of attorneys fees under 42 U.S.C. Section 1988.

WHEREFORE, MOORE respectfully requests the following relief:

1. For compensatory damages in an amount of in excess of $25,000.00, according to proof;

2. For attorneys fees pursuant to 42 U.S.C. Section 1988;

3. That MOORE recover his costs of suit incurred herein;

4. And for such other and further relief as the Court deems just and proper.

Dated: February 20, 1987.

PIZER & MICHAELSON INC.

By /s/ Hugh R. Coffin
HUGH R. COFFIN
Attorneys for Plaintiff

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GARY A. MOORE, Plaintiff-Appellant, v. CITY OF COSTA MESA, et al., Defendants-Appellees.	No. 87-6432 D.C. No. CV87-1125MRP ORDER (Filed Jan. 9, 1990)

Before: HALL and LEAVY, Circuit Judges, and GEORGE,* District Judge

The panel has voted to deny the petition for rehearing. Judges Hall and Leavy have voted to reject the suggestion for rehearing en banc, and Judge George has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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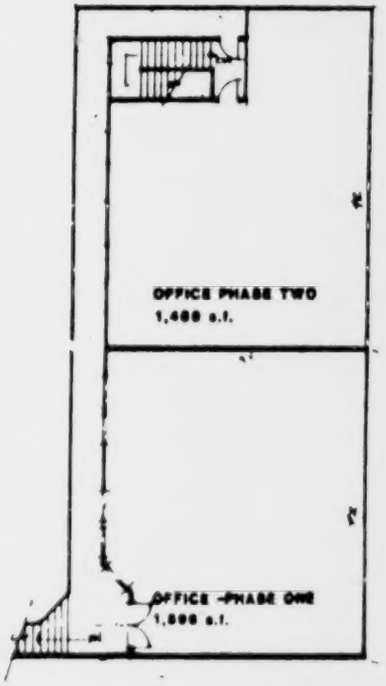
* The Honorable Lloyd D. George, United States District Judge, District of Nevada, sitting by designation.

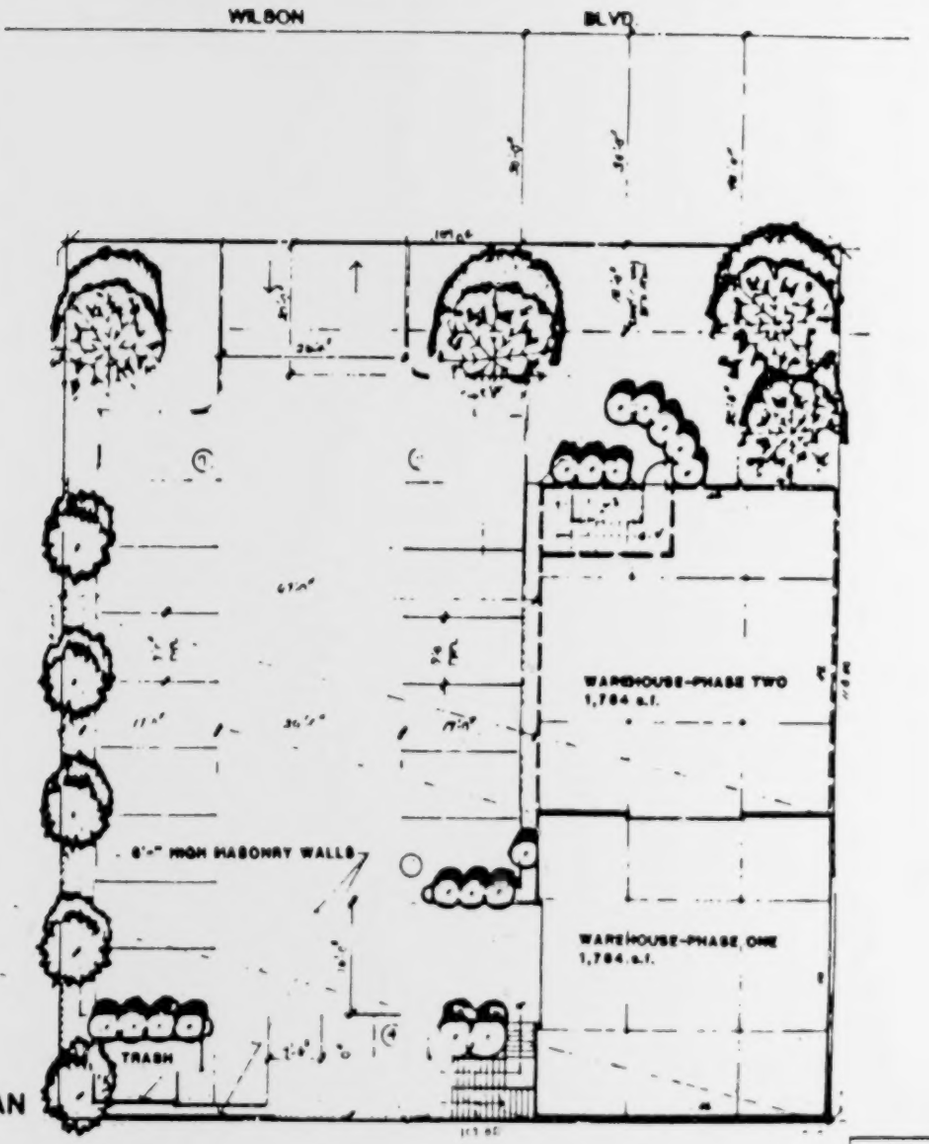
APPENDIX H

TABULATION

LAND	15,998 s.f.	(.39 ACRES) 11,864 S.F. AFTER R.O.W. DEDICATION
BUILDING	6,818 s.f.	
COVERAGE	57 %	
PARKING REQUIRED		
OFFICE @ 1/300 S	18.4	STALLS
COMM'L/WAREHOUSE @ 1/500 S	7.1	STALLS
TOTAL	19.8	STALLS
PARKING SHOWN	20.0	STALLS
LANDSCAPE (OTHER THAN SETBACK)	880 s.f.	
REQ'D 14 x 20'-0" S		
PROVIDED S	880 s.f.	
OPEN SPACE	5,878 S.F./50%	
PARKING AREA	5,468 S.F./46%	



SECOND FLOOR PLAN



SITE / GROUND FLOOR PLAN

0 5 10 20 40 60

CONCEPTUAL PLAN FOR:

GARY MOORE CARPETS

225 WEST WILSON , COSTA MESA , CALIFORNIA

HASTINGS LUNDSTROM ARCHITECTS